Supreme Court, U.S.
FILED

94 535 SEP 1 2 1994

NO.

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October, 1994 Term

William J. Zisk and Lois E. Zisk
Petitioners
vs.
Superior Court of Placer County
California Appellate Department
Respondent

Kent R. Walker
Respondent/Real Party
In Interest

City of Roseville, California
Respondent/Indispensable Party.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PLACER COUNTY CALIFORNIA APPELLATE DEPARTMENT

By: William J. Zisk & Lois E. Zisk - PRO-SE
205 Thomas Street
Roseville, CA 95678
(916) 782-2233

September 9, 1994

26 pp

INTRODUCTION TO QUESTIONS PRESENTED

Respondent court dated, signed and filed a substantially injurious decision against petitioners, to the recent chapter of over 20 years of constant ongoing litigation, stemming from petitioners' application to the City of Roseville for a building permit, which resulted in condemnation of petitioners' property located at 205 Thomas Street in Roseville, California 95678. Petitioners pray the accompanying motion be considered.

Petitioners feel this Honorable Court may exercise its inherent supreme power to rectify injustices believed to exist, proximating from said condemnation.

QUESTIONS PRESENTED

1. Whether petitioners have been deprived of their Constitutional rights of due process by respondent court decision filed April 6, 1994, which was rendered by judges deemed disqualified, **after** petitioners March 22, 1994 filed request for disqualification[s]?

2. Whether [**now**] appellate justice 'Keith Sparks' - referred to in Appendix B, being the City of Roseville's attorney at the time petitioner's applied for the building permit referred to in the accompanying motion, and, including his [**continued**] involvement as 'respondent court' judge in condemnation of petitioners' property, and, involving his continued interests to influence the outcome[s], [**ending**] with his denial containing misrepresentations to petitioners application for **writ of mandate** in this recent chapter of over 20 years of ongoing litigation, constitutes conflict of interest, bias, prejudice, miscarriage of justice, and violation of due process under both State and Federal Constitutional provisions?

3. Whether the City of Roseville, California has abandoned the condemnation of petitioners' property, for failure to deposit the 'total sum of the judgment' into court?

4. Whether, because the City has failed to pay the **total sum** of the judgment into court, coupled with aforesaid judicial involvement by Keith Sparks in his **many dual roles** in the cases involved, as a result of condemnation by the City, entitles petitioners to a due process renewal of the cross-complaint referenced within the condemnation action see exhibits A, B, C, incorporated and attached to accompanying motion?

LIST OF PARTIES

The title of this petition contains the names of all parties Petitioners do hereby inform this Honorable Court that the City of Roseville, California 95678 (City hereafter) is deemed an indispensable party, and, accordingly, will also be concurrently served all documentations submitted in this Honorable Court.

TABLE OF CONTENTS

PAGE

INTRODUCTION TO QUESTIONS PRESENTED-------- i

QUESTIONS PRESENTED----------i

LIST OF PARTIES----------ii

TABLE OF CONTENTS----------iii

TABLE OF AUTHORITIES----------v

OPINIONS BELOW----------1

JURISDICTION----------2

CONSTITUTIONAL PROVISIONS----------2

JUDICIAL NOTICE----------2

STATEMENT OF THE CASE----------2

REASONS FOR GRANTING THE PETITION----------4

1. Respondent Court decision violates "legislation" and must be annulled in the interests of public importance, due process, and miscarriage of justice.----------4

2. Respondent Court decision is not a 'legal ruling' and constitutes evidence of bias and prejudice, violating due process.---------- 6

3. Justice Sparks denial in Appendix B is a misrepresentation and constitutes evidence that he was interested in the outcome of anything before him with the name 'ZISK' on it. 'Sparks

PAGE

P.J.' is the [same] Roseville City Attorney in condemnation of Zisk property proximating Zisk injuries. Sparks is [also] the same respondent court judge involved with cases having the name 'ZISK.'----------8

4. Respondent court decision is evidence that the affirmed judgment is the result of it's interests in the outcome of the litigation, and further evidence and support for Petitioners' contentions of consistent bad faith denials of due process, on going for over twenty years.----------11

5. The issues presented are of substantial public importance.----------13

CONCLUSION---------- 13

VERIFICATION---------- 14

TABLE OF AUTHORITIES

CASES — PAGE

Bagley v. Bagley---------- 6
292 N.Y.S.2d 796, 799, 57 Misc.2d 388
Daily v. Warden---------- 6
239 A.2d 778, 780, 3 Md App. 425
Ex *parte Wallace*---------- 6
24 Cal.2d 933, 152 P.2d 1 (1944)
Hollingsworth v. Superior Court---------- 5
(1987) 191 Cal App 3d 22, 28
Lewis v Superior Court---------- 7
198 Cal. App 3d 1104 (Feb 1988)
Matter of Beverly Hills Bancorp---------- ---------- 5
(1984) 752 F2d 1341 (re 28 USC 455)
People v Brown---------- 7
6 Cal App 4th 324, 332
Pinkerton v. Farr---------- 6
220 S.E.2d 682, 687, 159 W.Va. 223
Sheppard v. Maxwell---------- 6
231 F.Supp. 37 (S.D. Ohio 1964)
State ex.rel. McFerran v. Justice Court---------- 6
32 Wash.2d 544, 202 P.2d 927 (1949)
T.P.B. v. Superior Court---------- 5
Tumey v. State of Ohio---------- 6
273 U.S.510, 47 S.Ct.437, 71 L.Ed. 749
(1927)
U.F.W. v Superior Court---------- 5
(1985) 170 Cal App 3d 104
United States ex rel. Bloeth v. Denno---------- 6
313 F.2d 364 (2nd Cir. 1963), cert. den.
372 U.S. 978, 83 S.Ct. 1112, 10 L.Ed.2d
143)
United States v Heldt---------- 7
668 F. 2d 1238, 1272 (D.C. Cir. 1981)
U.S. v Barry---------- 7
938 F2d 1340 (D.C. Cir. 1991)
Urias v Harris Farms. Inc.---------- 5
(1991) 234 Cal App 3d 416

Codified Statutes/Court Rules/Constitutional Provisions

PAGE

California Code of Civil Procedure (CCP)

CCP 170.3----------3,4,5

CCP 170.3 section (c), (3)----------7

CCP 170.3 Section (c), (4)----------10

28 USC 2106 and 455----------2,11

American Bar Association Code of Judicial---------- 2,11,13
Conduct Cannon 3C

Fourth Amendment to the Constitution of the----------2
United States

Fifth Amendment to the Constitution of the----------2
United States.

Fourteenth Amendment to the Constitution of----------2,6
the United States

Article I-Section 19 to the Constitution of the----------2
State of California

Article VI-Section 13 to the Constitution of the----------2
State of California

California Rules of Court Rule 56(d)---------- 9,10,11,12

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PLACER COUNTY CALIFORNIA

Petitioners William J. Zisk and Lois E. Zisk, husband and wife, respectfully submit this verified petition and accompanying motion in this Honorable Court, with prayers, that Certiorari be granted to annul respondent court decision and for instructions.

OPINIONS BELOW

Respondent Court decision is reproduced in **Appendix A** California Third District Court of Appeal denial of petition, for writ of mandate, to annul respondent court decision, is reproduced in **Appendix B**. Although Justiice "**SPARKS**" purported reasoning for his summary denial, the record will show that petitioners did in fact submit a **proper** PETITION and the court clerk did in fact **file** it.

SEE: "**Sparks**" IN ACCOMPANYING MOTION RE:
"**City Attorney,....**"

"SPARKS" had an interest in the outcome, being the attorney for the City initiating the condemnation proceedings against petitioners. In addition to protecting respondent court interests in the outcome, he resorted to misrepresentation to purport valid reasoning in denying the relief sought. As a consequence of the denial by "SPARKS," petitioners were forced to expend yet more expense, waste of time, and stress to serve and file a petition for review in the California State Supreme Court of last resort. Petitioners made a showing, using evidence (13 copies plus an original), that proper petitions were in the prior court -- (4 copies plus the original). Irrespective of clear law and undisputed fact, petitioners were entitled to relief, the State Supreme Court

denied review on June 22, 1994, and did so, without opinion. **Appendix C**.

JURISDICTION

The California State Supreme Court of last resort denied discretionary review on June 22, 1994.

LEGISLATION AND CONSTITUTIONAL PROVISIONS

1. Codified statutes 28 USC 2106 and 455. American Bar Association Code of Judicial Conduct Cannon 3C.

2. Fourth, Fifth and Fourteenth Amendments to the United States Constitution, Article I-Section 19 and Article VI, Section 13 of the California State Constitution.

JUDICIAL NOTICE

Petitioners are aware that a petition for certiorari, to the same respondent court, was filed in this Honorable Court on July 7, 1994 -- (CASE NO. 94-198). Respondent court also disregarded Mr. Kile's request for disqualification[s]. Petitioners request this Honorable Court take Judicial Notice of Mr. Kile's case in consideration of this immediate petition.

STATEMENT OF THE CASE

Petitioners have simultaneously submitted with this petition, a motion that a more complete detailed statement be considered and allowed .

Respondent/Real party in interest, Mr. Kent R. Walker, is an attorney who was retained by petitioners to defend against most recent allegations by the City of Roseville, in Placer County California Superior Court Case No. 84527, of

'placing illegal fill somewhere' on our property (SIC), stemming from the condemnation of our property.

Walker filed a complaint for alleged breach of contract, for attorney fees, in Roseville Municipal Court, on September 21, 1992.

We answered and cross-complained for damages in excess of the Municipal Court jurisdiction and requested a transfer of the entire action to the superior court, which was denied. Judgment was granted on the complaint and our cross-complaint was dismissed at the same time and we appealed.

On March 14, 1994, respondent court filed an order striking petitioners' objections pursuant to California Code of Civil Procedure (CCP hereafter) Section 170.3, as purportedly legally insufficient. We again filed for disqualification[s] of respondent judges on March 22, 1994, seeking disqualifications and that a new entirely disinterested panel be provided by the Judicial Council.

Without any 'answer' in response to the filed objections, petitioners received a decision by surprise that was signed, dated and filed on April 6,1994. Pursuant to the statute, petitioners [FILED] for writ of mandate to annul the decision as void for want of jurisdiction/authority. The failures by the court to "STRIKE" the second objections [OR] answer or act in any manner constituted [AUTOMATIC] disqualifications as a matter of law.

***

The entire matter dates back to petitioners seeking a building permit to the ultimate "AMERICAN DREAM" of being owners of a home built by hard work, and on suitable property of sylvan beauty, after complying with conditional requirements. The property was safe to build our dream home on. After compliance by petitioners, of the requirements set forth by the planning commission, the City

Council refused to issue the permit. Petitioners spent thousands of dollars in meeting the requirements along with pride and hard work, only to find out that the property was NOW worthy of it's full potential to the City in its' secret and successful inducing petitioners to conduct improvements, by using petitioners money, hard work and creativity to experiment the property's full potential to "someone" other than petitioners.

The City's condemnation has yet to yield any result, now going on over 20 years. Petitioners still occupy and maintain the property which is the same address as listed on this petition. The City's failure to pay the "total sum" of the judgment into court combined with the City's failure to proceed, is deemed an abandonment. Petitioners must be returned ownership and a building permit issued.

REASONS FOR GRANTING THE PETITION

1. Respondent Court decision violates "legislation" and must be annulled in the interests of public importance, due process and miscarriage of justice

California Code of Civil Procedure 170.3 states that when objection for cause is filed, a judge who fails to consent or answer within ten days shall be deemed disqualified and any rulings thereafter are in excess of authority/jurisdiction.

Although a judge so challenged has power to order objections stricken as legally insufficient, that power must be imposed within the time restraints of the code. Here, in the immediate instance before this Honorable Court, as in the instance of the case Judicially Noticed CASE NO. 94-198, not one judge acted to timely filed objections, prior to ruling on the appeal[s].

Petitioners initially submitted disqualification of the respondent court judges, which was stricken. Petitioners again filed objections requesting disqualification[s] on March 22, 1994. The matter at issue is controlled factually and legally by several cases, the one most direct on point is the case of *Urias v Harris Farms*. Inc. (1991) 234 Cal App 3d 416.

Urias attempted disqualification by written application pursuant to CCP 170.3, but was not considered for want of service. A second written request for disqualification was thereafter served and filed. No response to the second application was made by the judge. The court held that the judge was disqualified. PP 421.

A peremptory writ of mandate is an appropriate means of challenging the failure or refusal of a judge to disqualify himself/herself after written application is made under CCP 170.3; *Hollingsworth v. Superior Court* (1987) 191 Cal App 3d 22, 28; 236 C.R. 193.

Because respondent judges were legally disqualified and because of their previous order striking the first request under CCP '170.3,' there is bad faith and definite interests in the outcome; 'strong appearance of impropriety,' *Matter of Beverly Hills Bancorp* (1984) 752 F2d 1341 (re 28 USC 455) *U.F.W. v Superior Court* (1985) 170 Cal App 3d 104; 216 C.R. 4.

> **"Any act of a disqualified judge is absolutely void whenever brought into question and open to attack at any time"** *T.P.B. v. Superior Court*" supra (Judicially noticed Case No. 94-198 Petition Page 4).

Moreover, the rendering of a decision by a judge who is biased in the action and who has been properly disqualified by timely motion of a party, violates the due process rights of that party, which are guaranteed under the Fifth and

Fourteenth Amendment to the Constitution of the United States. "Aside from all else, 'due process' means fundamental fairness." *Pinkerton v. Farr* 220 S.E.2d 682, 687, 159 W.Va. 223. "Due process has to do with denial of fundamental fairness shocking to the universal sense of justice." *Bagley v. Bagley* 292 N.Y.S.2d 796, 799, 57 Misc.2d 388.

"A contention of bias on the part of the trial judge is one that alleges a violation of the constitutional right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution." *Daily v. Warden* 239 A.2d 778, 780, 3 Md App. 425 (citing *Tumey v. State of Ohio*, 273 U.S.510, 47 S.Ct.437, 71 L.Ed. 749 (1927); *State ex.rel. McFerran v. Justice Court,* 32 Wash.2d 544, 202 P.2d 927 (1949); *Sheppard v. Maxwell*, 231 F.Supp. 37 (S.D. Ohio 1964); Ex *parte Wallace,* 24 Cal.2d 933, 152 P.2d 1 (1944); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2nd Cir. 1963), cert. den. 372 U.S. 978, 83 S.Ct. 1112, 10 L.Ed.2d 143).

2. Respondent court decision is not a 'legal ruling' and constitutes evidence of bias and prejudice violating due process.

When Respondent court dated, signed, and caused the decision to be filed and served, it had specific legal knowledge that it had acted contrary to the statute, which mandated action within the ten days from March 22, 1994.

Clearly, the decision dating and filing of April 6, 1994 is outside the ten days and a showing that it is not a legal ruling at the outset. Petitioners' **second** filed objection was obviously not purportedly legally insufficient because it as

well would have been stricken:

> **"We therefore hold that although a challenged judge has the power to order a statement of disqualification stricken as legally insufficient, such power [must] be exercised within the time limits imposed by section 170.3 subdivision (c), (3). Having failed to do so, Judge Major was disqualified and has no power to act in this case."** *Lewis v Superior Court* 198 Cal.App. 3d 1104 (Feb 1988).

Therefore, the decision on its face, constitutes evidence of bias and prejudice. Had respondent court not been interested in the outcome, and had it not been zealously motivated with bias and prejudice[s] to affirm the judgment, it would have recognized the legal necessity and ethical duty to refrain from any further involvement in the appeal and simply instructed the clerk to contact the Judicial Council for replacements.

> **"A particular judicial ruling can be evidence of an extra/judicial bias or prejudice."** *United States v Heldt* 668 F. 2d 1238, 1272 (D.C. Cir. 1981), *U.S. v Barry* 938 F2d 1340 (D.C. Cir. 1991).

Respondent court knowingly resorted to affirming the judgment in flagrant violation of due process, in flagrant violation of a legal necessity and ethical duty to recuse. Petitioners were legally entitled to a writ of mandate. *People v Brown* 6 Cal App 4th 324, 332-(footnote No.6) (Dec 1993). As in the Kile case (No. 94-198 Page 10-conclusion) the court was well aware of the ten days because it backd- .ed his order.

3. . Justice Sparks denial in Appendix B is a misrepresentation and constitutes evidence that he was interested in the outcome with anything before him with the name "Zisk" on it. 'Sparks P.J.' is the [same] Roseville City Attorney involved in the initiation of condemnation of Zisk property proximating Zisk injuries. Sparks is [also] the same respondent court judge involved with the comdemnation, and in related cases having the name 'ZISK' on them.

Petitioners pray the accompanying motion is considered and that this Honorable Court be fully informed of the tremendous herculean efforts, including substantial prejudices, that we have been forced to endure as the result of the taking of our property by the City, we believe to be in flagrant violation of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

The **same** Keith Sparks signing the accompanying Appendix B, as acting P.J., is the **same** former City Attorney and the **same** Placer County Superior Court Judge in condemnation of our property.

As with the respondent court, there are interest[s] in the outcome, and due process had been wanting at the inception, because of Keith Sparks' dual roles. There is no doubt of his influences, especially with attorney "Desmond," who initiated the **"secret stipulation"**, and others he is in contact with, who might have to litigate before him, and, those who need his help. Justice Sparks should have never participated in **any** judicial capacity in any matters stemming from his interests in the condemnation.

It is substantially clear to us, that there were improprieties, that due process has been flagrantly violated with conflict of interest[s]. "Police Powers" were flagrantly abused in

eminent domain by Sparks, who has influenced the outcome[s] clear down to his ruling in Appendix B. He even caused [a] clerk to draft an unnecessary 'Rule 56(d) notice' **on** April 22, 1994 which was mailed **after** receipt of accepted 'corrections.'

Therefore, in order to make such a ruling in Appendix B, Justice Sparks would have to compare our petition with the clerk's '**NOTICE**' RE RULE 56(d) OF THE CALIFORNIA RULES OF COURT' referenced. The **notice** specifically dealt with exhibits:

> "The exhibits are not index-tabbed by number or letter.
> Each exhibit is not consecutively paginated.
> The exhibits do not begin with a table of contents listing each document by title and index-tab number or letter."

[This] petition is also verified and we have stated, the notice was moot when it was written and mailed on April 22, 1994, by the **same** clerk involved in filing and in accepting corrected documents the **same** morning.

Although Sparks had a proper petition, in full compliance with the clerks notice, **in his hand**, he chose not only to misrepresent that issue, but further chose to misrepresent the petition as an 'extraordinary writ' instead of a writ of mandate. The court clerk involved, and court records will verify these material issues raised.

***

Justice Sparks had Petitioners valid compliance of the Clerk's notice **IN HIS HAND** when he 'summarily denied' that petition for **writ of mandate** with his misrepresentations, as a basis, being **another** extension of his interests as former "City Attorney", "Respondent Court Judge," "Justice of the Third

District Court of Appeal", in subject matter arising from our seeking the building permit to fulfill the American Dream of building a home, which proximated this entire ongoing ordeal, including our efforts to protect our property from confiscation (accompanying motion.)

FURTHERMORE, summary denial, effectively kept secret, and, was further intended to protect and isolate respondent court from exposure to the Judicial Council, extending the interest reciprocally, to the respondent court interests, with his ruling. Had an order in mandate issued, the Judicial Council would have been notified under statutory mandate, for the selection of a new and disinterested panel to preside over the appeal. It must be kept in mind that the respondent court was also effectively allowed to not respond, answer, or object by a "summary denial."

Lastly, the verified petition for writ of mandate sufficiently set forth both fact and law entitling us to relief. Clearly, Justice Sparks was **again** under duty to recuse and he did not because of his interest in the outcome of anything bearing the name "ZISK". In addition, what he accomplished, even if there were no conflicts of interest[s], was a denial on matters of surplusage regarding the corrections pertaining to 'exhibits' California Rules of Court 'Rule 56(d)' does not mandate a summary denial to a petition for mandate. Fact and law were set forth and verified in our petition and the respondent court decision was alleged illegal and thus not under review on the merits. The exhibits, although included as an aid to the court, really were unnecessary in the context of mandamus to a very narrow issue.

FACT: Respondent court did not respond to filed objection.
LAW: If a judge does not act within ten days,..... his disqualification is automatic and he has no power to act thereafter Code of Civil Procedure, Section 170.3 (c), (4)

It is important to note a petition for writ of mandate has a **RED COVER.** The red cover on our petition **got immediate attention on** April 21, 1994 when it was filed, which is the EXACT same day Justice Sparks denied Kile's petition -- see judicial notice of Kile's Petition for Certiorari No. 94-198(Page 5a). [His] petition had no exhibits and was not summarily denied under 56 (d). Kile's petition set forth almost the identical LAW and exact same fact. Justice Sparks correctly called Kile's petition "writ of mandate" while calling ours "petition for extraordinary writ", thus concealing both petitions which were in fact identical in issues [of] fact and in law. Therefore, a reasonable person could find Justice Sparks planned denial of our petition [on April 21, 1994] when he denied Kile's petition on the same date. Had he properly granted Kile's, he would have had to grant ours. Kile's was denied as a result of artifice as well.

4. Respondent court decision is evidence that the affirmed judgment is a result of it's interests in the outcome of litigation, and further evidence and support for petitioners' contentions of consistent bad faith denials of due process, going on over 20 years.

Pertaining to respondent court, a decision was made irrespective of clear law preventing it's legality as set forth. Respondent court further disregarded a clear duty to recuse as the result of the failures to timely answer. 28 USC 455; A.B.A. Cannons.

Regarding the judicially noticed case of Kile v respondent court, et al, NO. 94-198, every respondent judge was involved with "backdating" the 'strike order', in furtherance of interests to control the outcome of his case involving an attorney violating Small Claims Law.

When respondent court got to our case to make a like strike order, every respondent court judge was guilty of a misdemeanor because of the "backdating" in Kile's order prior; the extent the respondent court will go to control litigation interests.

It appears that respondent court was aware that Justice Sparks as "P.J." would be involved in mandamus in both Kile's and petitioners cases. Pursuing mandamus would be futile and a reason for disregarding **both** second objections, .

Now we have Justice Sparks, who misrepresented not only the type of petition before him, and the fact that the petitions had been corrected, but in the furtherance of his interests as prior prosecutor for the City of Roseville in condemnation, and, although he should not have been involved in any judicial capacity, he summarily denied on the basis of superfluous matter while involving a clerk with his secret intended design from the start. While petitioners did in fact want the court to be fully informed with the initial submission of the exhibits, and further complied in good faith with the clerk's personal instructions on April 21, 1994, the exhibits were irrelevant matter in the context of the relief sought. Kile's case before him proved this contention, otherwise '56(d)' would have been used and it was not. (No. 94-198 petition question 3 and Appendix B).

Justice Sparks' overall conduct in petitioners mandamus proceedings, definitely points to irregularities and substantial appearance of impropriety. The Zisk name automatically rang the bell for default by intent and design. Just how can Justice Sparks justify petitioners' loosing the recent chapter of over 20 years of ongoing litigation by an alleged default regarding surplusage.

Cannon 3C Commentary:

"A judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association".

5. The issues presented are of substantial public importance.

The legislature obviously intended legislation for public use and because of the importance of the legislated matters, the various statutes were codified in express terms in conjunction with constitutional provisions. When a judicial officer disregards the law he/she must adhere to, regarding the mandated respondent court recusals, and another judge down the line disregards the law pertaining to his responsibilities, then the resultant effect is the destruction of the very element that created the avenue of court redress, instead of taking matters to the streets. If a judge doesn't follow the law, duties, nor ethics, then why should anyone else be expected to do any better. What legacy must we leave the children of this nation..., one of lawlessness, tyranny, corruption? No wonder public trust and confidence in the judicial process is diminishing rapidly by it's abuses. A lot can be said for over 20 years of litigation to condemnation that never should have been pursued against petitioners.

CONCLUSION

Petitioners believe that a showing has been made that due process rights have been violated by judges deemed disqualified and that respondent court decision affirming judgment must be annulled in the interest of justice for want of authority.

Every court ruling involved, stems from petitioners application for a building permit which was destroyed, upon the advice of then City Attorney Keith Sparks on the basis of a purported bikeway master plan that after twenty-one years has not been implemented.

Petitioners believe that a review by this Honorable Supreme Court will reveal due process entitlement to renew the cross complaint in the condemnation action. The judgment in condemnation is before this Honorable Court, and may be seen in the accompanying motion in EXHIBITS "B", as well as evidence, that Keith F. Sparks was in fact Judge. EXHIBIT "C" also documents Keith F. Sparks as attorney, prosecuting the City's interests in advisory capacity on the question pertaining to the building permit application that ultimately formulated the plan to condemn petitioners property.

VERIFICATION

I, William J. Zisk and I, Lois E. Zisk are the petitioners in this Honorable Court and have prepared this petition. I/We have read it and am/are familiar with its' content. As to those matters of personal knowledge, I/We declare them to be true and correct. As to those matters of statements under information and belief, I/We believe them to be true and correct.

I/We declare under penalty of perjury that the foregoing is true and correct.

EXECUTED THIS SEPTEMBER 9, 1994

WILLIAM J. ZISK ---- PETITIONER
LOIS E. ZISK ---------- PETITIONER

Appendix "A"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF PLACER
APPELLATE DEPARTMENT

KENT R. WALKER,
Plaintiff/Respondent,

vs.

WILLIAM J. ZISK, et al.,
Defendants/Appellants

NO. SAP-0310
DECISION

Filed April 6, 1994

Defendant appeals from a judgment of the municipal court in favor of plaintiff following a jury trial. On appeal, defendant objects to five orders of the lower court: (1) order sustaining plaintiff's demurrer to defendant's amended cross complaint for legal malpractice without leave to amend, (2) order granting plaintiff's motion to strike portions of the amended cross complaint without leave to amend, (3) order denying defendant's motion to transfer the action to superior court, (4) order granting plaintiff's motion in limine regarding expert testimony, and (5) order granting plaintiff's motion for directed verdict on the cross complaint. We find that the lower court's rulings on each of these matter were proper, and therefore we shall affirm.

As to the first three orders complained of the record reflects that on August 2, 1993, the day before the original trial date in this matter, the trial court heard defendant's motion to transfer this action to the superior court on the ground that the damage allegations of the form cross complaint for breach of contract took the matter out of the jurisdiction of the municipal court. The record does not include an order on this motion, but the parties agree that, rather than rule on the motion to transfer, the court ordered

defendant to file an amended cross complaint to clarify his damage claims. The court also continued the trial to September 28. The amended cross complaint was also a form pleading and added a second cause of action for fraud. Plaintiff demurred to the second cause of action on the ground that it exceeded the scope of the leave to amend granted and was prejudicial to plaintiff in light of the impending trial date. The plaintiff also filed a motion to strike paragraph BC-4 alleging tort damages for emotional distress. The trial court sustained the demurrer without leave to amend on the grounds prayed for, and, since that left only the breach of contract cause of action remaining, the court granted the motion to strike the tort damages. Finally, the court denied defendant's request to transfer the action to superior court because the only damage allegations remaining in the cross complaint were within the jurisdiction of the municipal court.

The original complaint stated only one cause of action for breach of contract. Defendant was allowed to amend only to clarify his damage claims, not to add additional causes of action. Although the same facts may underlie the breach of contract and fraud claims, the fraud cause of action stated an entirely new legal theory, and to allow its assertion on the eve of trial would have been prejudicial to plaintiff and contrary to the order allowing the amendment. In light of the clearly proper ruling on the demurrer, the trial court's ruling on the motion to strike the tort damage claims from the remaining breach of contract cause of action was also proper. Emotional distress damages are not recoverable in a legal malpractice/breach of contract claim, absent special circumstances which were not pled in the cross complaint. Merenda v. Superior Court (1992) 3 Cal. App. 4th 1. Likewise punitive damages are not permitted in a breach of contract claim. Civil Code #3294 (a). Finally, in light of the rulings on the demurrer and motion to strike, the municipal

court properly denied defendant's request to transfer and retained jurisdiction over this action.

With respect to the last two rulings objected to by defendant, the record reflects that plaintiff served defendant with a request for disclosure of witnesses and evidence at trial, pursuant to CCP #96. Defendant objected on the ground that plaintiff had not complied with CCP #2034 with respect to procedures for exchange of expert witness information. At the time of trial, plaintiff filed a motion in limine to exclude any expert evidence as to the alleged legal malpractice, on the ground that defendant had not complied with the request under #96. The court granted that motion, and, since defendant's expert evidence in support of his claim of malpractice was excluded, the court granted plaintiff's motion for directed verdict on the cross complaint.

Although CCP #94 provides that discovery in municipal court actions shall comply with notice and format requirements of CCP #2016 et seq., there is nothing in that section or in #96 which would require a party to comply with the formal procedures of #2034 with respect to pre-trial discovery of expert witness information in order to obtain a statement of witness and evidence pursuant to #96. In fact, the specific time limits set forth in #96 lead to the opposite conclusion. Therefore, the trial court properly excluded any expert evidence in support of the cross complaint pursuant to #97(a), and properly granted the motion for directed verdict on the cross complaint, on the ground of absence of expert testimony to support the claim of legal malpractice. For the foregoing reasons, the judgment of the municipal court is affirmed.

DATED: 4-6-94 S/"ROEDER, P. J."

S/"COUZENS, J."

S/"GADDIS, J."

Appendix "B"

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

WILLIAM J. ZISK AND LOIS E. ZISK
Petitioner

FILED MAY 3, 1994

vs.

3 Civil C018141
Placer SAP0310

SUPERIOR COURT, PLACER COUNTY
Respondent
KENT R. WALKER
Real Party In Interest

By the Court:

Petitioner(s) having been notified that the petition for extraordinary writ failed to comply with rule 56(d) of the California Rules of Court, and petitioner(s) having failed to correct the specified defects within the time provided by the notice of this court, the petition is summarily denied. This order is final forthwith as to this court, as provided by rule 24(a) of the California Rules of Court.

DATED: May 3, 1994

S/"SPARKS, Acting P.J."

cc: See Mailing List

Appendix "C"

Third Appellate District No. C018141
S039927

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

WILLIAM J. ZISK Et Al., Petitioners

FILED JUN. 22, 1994

v.

PLACER COUNTY SUPERIOR COURT
Respondent

KENT R. WALKER, Real Party In Interest

Petition for review DENIED.

LUCAS
Chief Justice